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GOVERNMENT BY JURY

As the various English colonies in America came to establish independent state governments and later a federal government they very generally provided in their constitutions for a perpetuation of that common law institution in judicial procedure then and since known as "trial by jury." Thus, in Connecticut, it was provided that "The right of trial by jury shall remain inviolate"; in Massachusetts, that "In all controversies concerning property and in all suits between two or more persons, except in cases where it has heretofore been otherwise used and practiced, the parties have a right to trial by jury"; in New Jersey, that "The right of trial by jury shall remain inviolate"; in Virginia, that "The trial by jury is preferable to any other and ought to be held sacred." In the Federal Constitution the language is "In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved." As new states came into the union, except perhaps a few of those within the last decade, they made similar provisions.

The term almost universally used is "trial by jury," but rarely was there any attempt to define the term or to state its elements. Evidently it was assumed that the term had by that time become so familiar, and its elements and attributes so fixed and well understood, that definition was unnecessary. "Trial by jury" meant to the people of the colonies that known to the common law of England and brought to and adopted in the colonies as an institution of that law. Thus, in the Maryland constitution it was declared "That the inhabitants of Maryland are entitled

to the common law of England and the trial by jury according to the course of that law." In the Federal Constitution it was provided that "no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law." Indeed it has all along been assumed that the "trial by jury" sought to be preserved was the English common law trial by jury with all its elements and incidents. The three words "trial by jury" connoted all those elements and incidents.

For instance, the jury was to consist of twelve men, freeholders of the county, selected and summoned by designated officers to attend before a judge of one of the common law courts to try under his direction, not the cases themselves, but only the issues of fact developed by the pleadings. They were not to render judgment, but only to answer questions of fact and then only when all twelve were agreed as to what the answer should be. They were to have the benefit of hearing the witnesses, the arguments of counsel, and the instructions of the judge upon matters of law and of his analysis of the evidence and of his comments, and even opinion, on the evidence if he deemed it necessary for their enlightenment; always, however, in such case reminding them that they were to answer according to their own opinion based upon the law and the evidence and not according to his opinion. It was such a trial the parties were entitled to by the common law, and their right to have the judge give the jury the benefit of his analysis and comments whenever he deemed it necessary for their full enlightenment was unquestioned. The term "trial by jury" connoted this right as much as any other.

Thus Sir Matthew Hale, writing of "trial by jury" about the middle of the seventeenth century and but a few years after the English settlements in America, wrote, "Another excellency of this trial is this; that the judge is always present at the time of the evidence given upon it (the issue of fact). Herein he is able in matters of law emerging upon the evidence to direct them; and also in matters of fact to give them great light and assistance by his weighing the evidence before them and observing where the question and knot of the business lies; and showing them his opinion even in matters of fact, which is a great advantage and light to laymen."¹

¹ *Hale's Hist. of the Common Law*, Ch. XII.

The full discretion of the judge as to when and to what extent the case required him to analyze and comment upon the evidence and even express his own opinion upon it does not seem to have been questioned in England till well into the nineteenth century, and in the few cases where it was questioned the exercise of the discretion was sustained. A few citations will illustrate the English understanding of "trial by jury" in that respect.

In *Balcher v. Prittie*,² Tindal, L. C. J., "summed up the case to the jury with strong remarks in favor of the defendant, yet the whole facts were submitted to them and they were at liberty to exercise their discretion." Held, "not sufficient ground for saying the jury were misdirected."

In *Solarte v. Melville*,³ one question was whether certain transactions were usurious. Tenterden, L. C. J., "told the jury that in his opinion the transactions were not usurious" but left the question to the jury for the exercise of their own judgment. The jury found in accord with the Chief Justice's expressed opinion. Held, that his expression of opinion was no ground for a new trial.

In *Davidson v. Stanley*,⁴ Baron Rolfe "left the case to the jury with strong observations upon the weakness of the evidence offered to support the plaintiff's case and particularly as to the non-production of the pass book, and as to the absence of a witness." Held, no ground for a new trial, Tindal, C. J., remarking that the judge "was perfectly justified in stating the precise effect of the evidence on his own mind."

Whoever has heard the "summing up" by English judges of to-day in jury cases will be satisfied that the right of the judge to analyze and comment upon the evidence and even express his opinion thereon still exists in full vigor in England. I do not know of any effort there to abridge that right.

The judges of the Federal courts of the United States exercise the same right as a part of their common law powers. The United States Supreme Court in *Capital Traction Co. v. Hof* said⁵: "Trial by jury is a trial by twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts and (except on acquittal of a criminal charge) to set aside their verdict if

² 4 Moore-Scott 295.

³ 7 B. & C. 430.

⁴ 3 Scott N. R. 49.

⁵ 174 U. S. 13.

in his opinion it is against the law or the evidence. This proposition has been so generally admitted and so seldom contested that there has been little occasion for its distinct assertion." The court also quoted from Sir Matthew Hale the following: "It (trial by jury) has the judge's observation, attention and assistance in points of law by way of decision and in points of fact by way of direction to the jury." Evidently Lord Hale meant by "direction" merely pointing, indicating, guiding, not commanding.

The same court had previously declared the same truth. In *Vicksburg R. R. Co. v. Putnam*,⁶ it said: "In the courts of the United States as in those of England, from which our practice was derived, the judge in submitting a case to the jury may at his discretion whenever he thinks it necessary to assist them in arriving at a just conclusion comment upon the evidence, call their attention to parts of it which he thinks important and express his opinion on the facts."⁷

Although thus far there has been no attempt in England to deprive the jury and the parties of this assistance of the judge when helpful to a correct finding, nor in this country as to the Federal courts, yet in many states have been enacted statutes designed to effect such deprivation. Even in Massachusetts it has been enacted that "The courts shall not charge the juries with respect to matters of fact, but may state the testimony and the law"; a most gracious permission for which the Massachusetts judges should be duly grateful. In Illinois, the legislature has undertaken to enact that the judge "shall only instruct as to the law of the case" and even that only in writing; also that he shall either give or refuse a requested instruction and that he shall "in no case after instructions are given, qualify, modify, or in any manner explain the same to the jury otherwise than in writing." In Georgia, if in any case, during its progress or in his charge to the jury, the judge shall "express or intimate his opinion as to what has or has not been proved" it is ordered by the legislature that a new trial be granted. In Kansas, the legislature requires the judge to write out and number his instructions, though he may read them to the jury, but he must do so before the counsel make their arguments to the jury. In

⁶ 118 U. S. 545, 553.

⁷ See also *U. S. v. P. & R. R. Co.*, 123 U. S. 113, 114; *Thompson v. Utah*, 153 U. S. 102, 106; Cooley on Const. Law, 239.

Oregon the constitution declares that "the right of trial by jury shall remain inviolate," but the statute declares that the judge in charging the jury "shall not present the facts of the case."

The foregoing are sufficient for examples of the efforts of legislatures to shear the "trial by jury" of an important element connoted by the term itself. I advance the proposition that such statutes in spirit and effect violate the constitutional provisions for the preservation of "trial by jury," and do this by eliminating what I hope I have shown to be as much an element of such a trial as some others which legislatures have not yet presumed to abolish. For discussion of this proposition the reader is referred to a paper read by former Supreme Court Justice Henry B. Brown before the American Bar Association in 1889. Of course, in those few states where the constitution itself eliminates that element no such question can arise.

But, apart from the constitutional question suggested, I advance the further proposition that such elimination militates against accuracy in the administration of justice and in effect tends to substitute an irresponsible government by jury for a responsible government of laws. Jurors have no such sense of responsibility, no such desire to justify their decisions as do judges. Jurors are called in for the particular case or cases and then dismissed back to private life. They are no longer jurors, no longer in the public view. They have no reputation for ability, integrity or faithfulness to maintain. They fall back into the multitude and are lost to sight. Not so with the judges, who still remain judges and in the public view; who desire and must maintain a reputation for ability, integrity, learning and faithfulness; who are constantly at the bar of public opinion and cannot hide in the crowd and be forgotten.

In early times there was much less need than now of a power in the judges to comment and even express opinions on the evidence. In those times the cases were few and simple in comparison with the cases now. The old system of special pleading developed single and precise issues to which the jury were confined and which required no great effort to solve. To-day many of the cases brought before a jury are complex and complicated, requiring careful and prolonged attention for an understanding of them. The abolition of special pleading has made the issues of fact less precise and clear. Now more than ever does a jury need the assistance of an able judge in clarifying the issues, in showing them the application and value of different items of

evidence, and indeed indicating how this or that bit of evidence impresses his own mind. One having the duty of deciding questions of fact, if he be conscientious and painstaking as a juror should be, naturally desires to ascertain how this or that bit of evidence impresses another, and especially another known to be intelligent, experienced and disinterested. In deciding upon any important business proposition we often and properly submit the evidence for or against to others in whose disinterestedness, intelligence and clear vision we have confidence, though we ourselves have the responsibility of the decision. We wish for a check upon our own impressions.

Long continued effort to reason connectedly is always more or less fatiguing, especially for those who do not make a business of it. All of us are liable at times to "slip a cog" in the process and to draw inferences that a more patient analysis will show to be incorrect. With men unaccustomed to reason carefully and patiently, the argument *post hoc ergo propter hoc* is often accepted and the more readily where no personal interest of their own is at stake. How often do we find that argument used in political discussions? While one political party is in power there comes a recurring period of business depression and the administration is blamed as the cause. Another party comes into power and later the business of the country revives; therefore the new administration is entitled to the credit.

A power in the judge to remind the jury of the incorrectness of such inferences, to expose that and other fallacies with which the arguments of counsel often abound, to show them the probative force or want of probative force of the various evidence adduced would seem to be often essential to the correctness of their decisions. The science of proof is not always a matter of common knowledge. To determine whether a proposition of fact is actually proved by the evidence submitted is not always easy. To determine the proper weight of any particular evidence requires some knowledge of the principles of logic. To comprehend the correlation of different items of a large mass of evidence pro and con requires special ability and training. Whoever will read the evidence given at the famous Tichborne Trial, with its enormous mass of circumstances, will see the need for that most masterly and luminous analysis of it by Lord Chief Justice Cockburn, who did not hesitate to tell the jury what consideration he thought should be given to the various parts of the evidence and to show them the correlation of the different parts.

Again, the steady influence of an able judge is often necessary to prevent miscarriage of justice in criminal cases. The jurors drawn from the vicinage share to a greater or less extent the current sympathies or prejudices of the community for or against the accused and, further, they feel the pressure of them during the trial. The crowd of spectators, even though silent, in some mysterious way has an influence. I think every judge in a trial exciting great interest and drawing great crowds has himself been conscious of such influence. Under this influence persons notoriously guilty under the law are often acquitted, and often other accused persons are convicted, even against the weight of evidence, because of the demand for a victim when the public has been outraged by some hideous crime. We have a recent instance of the latter in the "Frank case" in that Georgia which has undertaken to forbid the judge in his charge or during the trial to express or "intimate" an opinion on the evidence in the case. It is now, after cool reflection, very generally believed that the evidence against him was untrustworthy and insufficient. Had there been upon the bench an unfettered judge to show the jury that untrustworthiness and insufficiency, the result might have been different.

It does not follow, however, that the final decision should be left with the judge, and the jury dispensed with. The plain men of the jury, drawn from the various occupations of common life, if not misled by appeals to their emotions or by plausible but fallacious arguments, are better triers of what is probable or improbable in motive and conduct in human affairs than are the judges taken from one single profession and set apart from the current of daily affairs. The jury acts as a negative on the judge. He must express his views publicly, if at all. The jury knows and is reminded that it need not accept his views. He can influence them only by the clearness of his reasoning. Neither one should be left alone to consider and decide upon the evidence. It is the combination of the two, the skilled reasoner and the twelve plain men of affairs, the latter having the last word, that constitutes the constitutional "trial by jury" and the best tribunal yet devised for decision of issues of fact.

It is interesting to inquire what interests and influence procured from so many legislatures the above described and attempted elimination of such an important element of trial by jury. The result is that the more experienced, able, eloquent

and shrewd counsel is given an immense advantage over the less experienced, able, eloquent and shrewd. There is no one to bring about an equilibrium. The jury is left under the influence of able, partisan counsel without any steadying, corrective influence of an impartial judge. I was a member of the judiciary committee of the Maine Legislature when the Maine statute forbidding judges expressing any opinion on the evidence was enacted. I recall the pressure from the stronger, abler lawyers of the state to secure its enactment. To the objection that such legislation might often work injustice to the clients of the less able and strong, the claim was frankly made before the committee that they were entitled to the advantage of their superiority. There was no claim that verdicts would be more likely to be right. The statute was aimed at able and strong judges who held to their right and duty to comment, explain and even advise in matters of evidence when they thought it necessary for the jury's proper understanding of the case. It was noticeable, however, that verdicts rendered before them were very rarely set aside as against the evidence.

The day is long past when juries can be induced by any urging or over-awing to surrender their own opinion at the end to that of the judge. English and American legal history abounds with instances of juries resisting even to stubbornness the insistence of partisan judges. All the efforts of the subservient judges in the trial of the "Seven Bishops" under James II failed to prevent an acquittal. There is no fear in England with its powerful judiciary that the judges may over-awe or control the jury. Why should there be here? Again, if the power of the court to set aside a verdict is to be retained, as it evidently should be, why take away the power of the court to aid in securing in the first instance a verdict that should not be set aside? Does not the former power really include the latter?

The party who feels confidence that upon the law and the evidence to be adduced he is in the right is not the party who would close the mouth of the judge upon questions of fact. Indeed, as said by the late Justice Miller of the United States Supreme Court in his article on Trial by Jury,⁸ "It is the observation of all experienced practitioners that such a party is always ready to submit his case to the court without a jury; while the party who fancies that in appeals to the prejudices

⁸ *Am. Law Rev.*, Vol. 21.

and feelings of the tribunal which tries his case he may find something which will induce them to depart from the strict law pertaining to it, or to construe the evidence more favorably to his side of the case, is generally the one who demands a jury." This should not be. There should be some check upon any impulse excited in a jury to disregard the law or to ignore the fair weight of the evidence.

Taking away the centuries long approved check, taking away the restraining, steadying influence of an able, learned and impartial judge (as all judges should be and would be if the people so willed) often leaves the liberty, property and reputation of the citizen practically in the power of twelve ordinary men fortuitously assembled, without individual responsibility, often inexperienced and unskilled in the sifting and weighing of evidence, forbidden the aid of disinterested experts, and often prone to decide upon impulse or first impressions rather than after patient, dispassionate, laborious reasoning. In the last analysis it subjects the citizen to a government by jury, instead of a government by law.

LUCILIUS A. EMERY.

MAINE, January, 1915.